No. 21809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON SAVINGS AND LOAN ASSOCIATION, etc.,
Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION, etc.,
Appellee.

APPELLEE'S BRIEF.

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Statement of the Case.

For the sake of convenience the United States District Court of the Central District of California will hereinafter be referred to as "The Court below", the plaintiff Jefferson Savings & Loan Association, will hereinafter be referred to as "Jefferson", and the defendant Lifetime Savings and Loan Association will hereinafter be referred to as "Lifetime".

There are three particular obvious errors in the Statement of the Case by counsel for Jefferson.

At page 4 of its brief Jefferson states: "In August of 1964, without notice to or consultation with Jefferson of any nature whatsoever, Lifetime sold the eight properties". The record clearly shows that there was consultation with Lifetime and that Jefferson had knowledge that the eight properties were to be sold. Both Donald Henke, the President of the plaintiff, and Rob-

ert Sonheim, General Counsel and Secretary of the plaintiff, as well as Burk L. Humphrey, testified that they discussed this matter at the office of defendant on August 6, 1964 [R. T. pp. 421-442; pp. 263-265; pp. 288-290]. In addition, correspondence which emanated from Burk L. Humphrey to Mr. Henke under date of August 25, 1964, made reference to the sale of properties "about which we talked when you were here" [Pltf. Ex. 11].

The second obvious error in the plaintiff's Statement of the Case appears at page 7 of its brief where it states

> "conveniently overlooked by Lifetime was the fact that the sales agreement also permitted Lifetime to exact a premium in the amount of fifteen per cent of the sales price in the event that the Durhams wished to pay off the encumbrance after 90 days."

The pertinent provision of the sales agreement [Pltf. Ex. 12] does not so provide but rather does provide that in the event the Durhams wanted a release of any of the individual parcels out of the total of eleven parcels covered by the single trust deed, they could then pay one hundred fifteen per cent of the amount for any individual parcel. It is common practice to provide for release clauses when a single trust deed covers multiple parcels of real property. Obviously the amount of each individual payment would have to be credited against the total long term purchase price.

The third and most serious error on the part of the plaintiff under the Statement of the Case is found at

page 9 of the Plaintiff's brief where plaintiff states as follows:

> "At the conclusion of the trial, Judge Westover held that Jefferson's interpretation of the provision was correct and that Lifetime's was incorrect: when Lifetime, without Jefferson's consent, sold property which was the subject of the LPA, and which it had acquired through foreclosure, it was obligated to pay over to Jefferson its ratable share of the net proceeds of the sale."

On pages 7 and 8 of its brief plaintiff states that its contention was that defendant Lifetime had a duty to pay to Jefferson seventy-five per cent of the *selling price* (less the plaintiff's share of the applicable costs and expenses of sale) when it sells and conveys to a third party (emphasis added). The court's judgment on Count I is not to this effect but instead the judgment of the Court clearly provides that Lifetime must obtain the written consent of Jefferson to the terms of sale before it can sell or otherwise dispose of any real property which had formerly secured the payment of any loan included within the LPA and which had been acquired through foreclosure proceedings by Lifetime. The judgment further provides that in the event Lifetime should sell or otherwise dispose of any real property without the written consent of Jefferson, then Jefferson is entitled to an immediate payment of 75% of the *net sales proceeds* (not *selling price* as plaintiff contended) obtained for such property by Lifetime.

Thus it can be seen that there are two distinct differences between the plaintiff's original poisition and the judgment of the court. The first is that Lifetime may sell with the written consent of Jefferson and thus not have a duty to make any payment. The second is that even should there be a sale without the written consent of Jefferson, the obligation of Lifetime under the judgment of the court is to pay 75% of the *net sales proceeds* and not necessarily the *selling price.*

It is to be noted that one of the major issues in the trial of Counts I and II in the court below was whether or not there were any *net sales proceeds.* The record is devoid of any finding that there were actually any net sales proceeds other than a single promissory note secured by a deed of trust. Actually, the trial judge himself stated that no money passed hands at all [R. T. p. 195, lines 19-25]. This is also evidenced by the closing statements from the escrow holder [C. T. pp. 117 and 119]. In fact, the trial court stated "there have been no net proceeds at all in this sale" [R. T. p. 190, lines 1-2]. (Emphasis added).

ARGUMENT.

I.

To Prevail in This Appeal Plaintiff Must Show That There Is No Substantial Evidence to Support the Findings of Fact.

Although the plaintiff does not specifically state such to be the case, in order for it to prevail in this appeal it must attack finding 16 of the Findings of Fact and Conclusions of Law which stated that Jefferson is deemed to have relied upon the statements made in Exhibit 11 as defining Lifetime's duties to it on the ground that there is not any substantial evidence to sustain it.

The power of an Appellate Court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the Finding of Fact and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.

> *American Loan Corp. v. California Commercial Corp.,* 211 Cal. App. 2d 515, 27 Cal. Rptr. 243 (1963).

If there is any reasonable doubt as to the sufficiency of the evidence to sustain a finding, the Appellate Court should resolve that doubt in favor of the finding and in searching the record and exploring the inferences which may arise from what is found there. To discover whether such doubt or conflict exists the Court should be realistic and practical.

> *American Loan Corp., supra;*
>
> *Brewer v. Simpson,* 53 Cal. 2d 567, 2 Cal. Rptr. 609 (1960).

Plaintiff has not carried its burden in this appeal and has failed to show where there was a lack of any substantial evidence to sustain the finding of fact.

To the contrary, defendant respectfully submits that it will show hereinafter that the evidence supports the findings of fact.

II.

The Judgment of the Court Below on Count I Was a Determination as to the Rights of the Parties in the Future and Did Not Affect the Rights of the Parties Under Count II.

The plaintiff advances a conclusion which is not supported by the evidence nor the findings of fact or the judgment of the court. That is, that the adjudication of the respective rights and duties of the parties under Count I affected the rights and duties of the parties under Count II.

Count I was a declaratory relief count seeking the court's determination as to the rights of the parties *in the future* under the LPA. In other words, by the plaintiff's own statements the Findings of Fact, the Conclusions of Law and the Judgment of the Court below the adjudication under Count I did not pertain to Count II but only to the rights and duties of the parties *in the future.*

The final judgment of the Court below on Count I pertains to future dealings inasmuch as it states "In the event that Lifetime sells or otherwise disposes of any real property . . ."; thus the wording which was drafted by counsel for plaintiff is in the future tense. The statement is that if Lifetime *sells*, not *if it has sold* [C. T. p. 213, lines 20-26; see also Conclusion of

Law Number 7 [C. T. p. 210, lines 26-31] which was drawn by counsel for plaintiff (emphasis added).

It should further be observed that the Findings of Fact, Conclusions of Law and Judgment on Count II are based on the particular facts pertaining to the sale of the five properties which were the subject of Count II and that these are not involved in Count I.

Finding of Fact Number 15 states that Lifetime by its conduct and statements made certain representations in connection with the sale of the five subject parcels of real property as to Findings of Fact Numbers 16 and 21 [C. T. pp. 208-209]. That the declaratory judgment on Count I only pertains to the rights and duties of the parties in the future is further evidenced by the remarks of counsel for the plaintiff contained in his final argument. There he stated that he was asking the court for declaratory relief as to the rights and duties of the parties with respect to those loans which *still remain* the subject of the contract and "declaratory relief as to the twenty-nine remaining loans." [R. T. p. 436, lines 7-22].

III.

There Are No Findings of Fact nor Is There a Judgment of the Court Below Which Provides That the Defendant Must Pay to the Plaintiff 75% of the Net Sales Price on the Five Properties Sold Under Count II.

Only one of the Findings of Fact of the Court below sets forth the amount which is to be paid by Lifetime to Jefferson. This is Finding Number 16 [C. T. p. 208, line 32, to p. 209, line 9]. There is no finding that Lifetime must pay to Jefferson the amount which

it had invested in the properties nor that it must pay to Jefferson 75% of the sales price or 75% of the net proceeds or any specific figure other than that of $23,-324.36 contained in Finding Number 16.

IV.

Absent Any Conduct on the Part of Lifetime Representing to Jefferson That It Would in Connection With the Sale of the Five Properties Pay to Jefferson Any Amount It Was Not Required to Make Any Payments and Had Very Broad Discretionary Powers and Authority Under the Terms of the LPA.

The LPA contemplated that all negotiations, servicing and dealings of any kind or nature pertaining to the loans and the properties which secured them and which were the subject of the LPA were to be performed by Lifetime and not by Jefferson. In this regard, the following provisions of the LPA are pertinent:

1. In paragraph 5 it is stated that Jefferson should in no event take part or be active in negotiations or preliminary steps leading to the consummation of loans which at the time of execution of the agreement or thereafter should become the subject of participation purchases by Jefferson.

2. Paragraph 8 specifically provides that nothing in the agreement is to be construed as a warranty or guarantee by Lifetime as to future payments by any of the mortgage debtors and that the sale of a participating interest by Lifetime to Jefferson was to be without recourse.

3. Under the provisions of paragraph 11 Lifetime was to retain physical possession of all documents, was to retain the loans in its name and was authorized to deal with the loans as though it were the sole and absolute owner.

4. Further evidence of the complete discretion and authority which it was contemplated would be vested in Lifetime is found in paragraph 12 which provides that Lifetime had the right to accept additional security for any participation loan, release collateral security, etc.

5. Under the provisions of paragraph 17 Lifetime was empowered to act upon any loan in default and the security property by any procedure which might be necessary in its sole discretion. It is to be noted that this authority specifically provided that Lifetime might act not only upon the loan which was in default but also upon the property which secured the loan in such manner as in its sole discretion it found necessary. Lifetime was not required to confer with Jefferson or obtain its consent or to even advise it prior to entering into any transaction pertaining to the security property.

Paragraph 17 further provides that Lifetime could manage, maintain or dispose of any security property acquired in any manner which it deemed necessary and that the parties would share ratably in the income and expense thereof and in the net proceeds of sale [C. T. pp. 7-9].

As is seen above, the LPA conferred very broad discretionary authority and powers on Lifetime both with respect to the management and maintenance of the loans or properties and also as to the disposition of the properties after foreclosure. Nowhere in the LPA is

there found any provision which requires Lifetime to sell only for cash. If this were the intent of the LPA it would obviously be so stated. Instead of restricting the authority of Lifetime in such a manner, the LPA gave to Lifetime the broadest possible authority, *i.e.,* that of disposing of the property in any manner which it deemed necessary.

Paragraph 17 of the LPA clearly provides that Jefferson was to share ratably with Lifetime in the net proceeds of sale to the extent of Jefferson's share in the unpaid principal balance due on the original loan. By Count II, Jefferson sought to effect a change in the wording of the LPA to provide that it was to receive its pro rata interest in cash from Lifetime even though no cash had been received on account of the sale or disposition of the property. This, of course, would have had the effect of making Lifetime a guarantor of the original loan which would be in direct contradiction to the provisions of paragraph 8 of the LPA set forth above.

Paragraph 13 of the LPA specifically provides that Lifetime had the *option* to repurchase from Jefferson its participation interest but that it did not have an obligation to do so [C. T. p. 8]. (Emphasis added).

The term "net proceeds" is defined as anything of value and not necessarily money (Black's Law Dictionary, 3rd ed., p. 1432; Webster's New Twentieth Century Dictionary Unabridged, 2nd ed., p. 1434).

The law is clear that a construction of a contract which would make it reasonable, fair and just is preferred to one that, though equally consistent with the language, would make the contract unreasonable and

unfair (*Cohn v. Cohn,* 20 Cal. 2d 65, 123 P. 2d 833 (1942)). The well-established rules of construction of agreements provide that an interpretation must not be given the LPA which would involve an absurdity (*Golden v. Fischer,* 27 Cal. App. 271, 149 Pac. 797 (1915)).

It is submitted that the only construction that would make the LPA reasonable, fair, just and operative and would not involve an absurdity would be one which allowed Lifetime to effect a sale to a third party for credit. To adopt a construction which would not allow Lifetime to effect a sale for credit would be to controvert the well-expressed intention of the LPA that the parties were to share in the entire transaction on a pro-rata basis. It must be remembered that Lifetime had a percentage interest in the loans and would also stand to lose if did Jefferson.

V.

The Court Below Determined That Because of Its Conduct and Statements to Jefferson Pertaining to the Five Properties, Lifetime Became Indebted to Jefferson in the Amount of $23,324.36 and Judgment in This Amount Should Be Affirmed.

The 15th and 16th Findings of Fact [C. T. p. 208, line 27, to p. 209, line 9] and the 9th Conclusion of Law [C. T. p. 211, lines 4-7] very clearly indicate the Court's finding that because of its conduct and statements to Jefferson with respect to the subject five properties, Lifetime has become indebted to Jefferson in the amount of $23,324.36 and this is the amount of the judgment of the Court below plus interest [C. T. p. 213, lines 29-31].

In a footnote to page 15 of its brief, the plaintiff attempts to show that Lifetime's statement to Jefferson that it would receive 75% of the net sale proceeds of $31,099.15 "was almost certainly a misstatement of its true intent . . .". Such is, of course, completely speculative and completely unsupported by the evidence adduced at the trial.

In fact, defendant's Exhibit A consists of four letters all of which were similar and which were sent to different Savings & Loan Associations concerning the same transaction and all of them stated that the addressee would receive 75% of a certain figure which was proportionately the same as for Jefferson. Thus it is easily seen that the position of the defendant has been consistent with respect to what was intended.

Even more importantly, as the Court below properly pointed out, the defendant is estopped to claim any sum in connection with the subject five properties greater than $23,324.36 [C. T. p. 208, line 32, to p. 209, line 9].

In this transaction the laws of the State of California were specified to be applicable to the interpretation of the LPA and to any right or liability arising under it [C. T. p. 9, par. 21].

The law in the State of California is well settled to the effect that a party is bound by recitals of documentary evidence introduced by him.

> *Dodds v. Stellar,* 77 Cal. App. 2d 411, 175 P. 2d 607 (1947).

The case of *Davenport v. Stratton,* 24 Cal. 2d 232, 240 (1944), 149 P. 2d 4 cited by plaintiff actually supports the position of the defendant. It was a situation where the defendant introduced into evidence with-

out objection a written statement which purported to show the amount due under a lease. Thereafter the defendant attempted to impeach his own exhibit and the court there said "This exhibit having been introduced in evidence by the defendant he is bound by its provisions."

A more recent case is that of *Harrold v. Harrold,* 100 Cal. App. 2d 601, 224 P. 2d 66 (1950), where the plaintiff introduced into evidence a financial statement of the defendant which had been prepared by the defendant and then attempted to show that it was not correct. The Court there held that the plaintiff was bound by the evidence disclosed therein and could not later be allowed to contradict or impeach the same.

In another case the court held that a party who introduces documentary evidence is not allowed to impeach or contradict it but is bound by its recitals *for all purposes* (emphasis added).

> *Kent v. First Trust and Savings Bank of Pasadena,* 101 Cal. App. 2d 361, 225 P. 2d 625 (1950).

The most recent case on the subject in the State of California appears to be *Jackson v. Donovan,* 215 Cal. App. 2d 685, 30 Cal. Rptr. 755, 758 (1963), where the Court held that where the plaintiff introduced a document in evidence he thereafter could not impeach or contradict it where there was no fraud involved.

Another analogous case is that of *Nicola-Neppach Co. v. Smith,* 154 Or. 450, 58 P. 2d 1016, 60 P. 2d 979, 107 A.L.R. 1124, where it was held that a party who introduces in evidence a deposition of a receiver of a corporation as to the value of its assets is bound by the statements therein.

It also is clear that one who introduces a document is bound by its recitals in the sense that he is not allowed to impeach or contradict it or to accept a part which is in his favor and repudiate another part which is opposed to his claim.

> *Snell Isle v. Commissioner* (CA 5), 90 F. 2d 481 Cert. Den. 302 U.S. 734, 82 L. Ed. 568, 58 S. Ct. 120.

In the instant case the plaintiff introduced Exhibit 11 into evidence without objection and relied on that exhibit in defining Lifetime's duties, to it. Therefore, it is clear that under applicable California law it cannot accept only a part of the exhibit and reject another part which is detrimental to its position.

There is no evidence in the record to the effect that Jefferson at any time disagreed with or disputed the amount set forth in Exhibit 11 by Lifetime as being due to Jefferson and plaintiff has not sought to suggest that it ever disagreed with the stated amount.

Early in the trial the Court below indicated that if it determined that the plaintiff was entitled to be paid back an amount on the LPA it was going to have to have some basis on which to work. In fact, the Court stated "I don't know how you can come in and say, 'we are entitled to the return of all of our money' when the property wasn't worth that much money. You might be entitled to the return of the reasonable value of the property." [R. T. p. 188, line 24, to p. 189, line 10].

However, despite this admonition by the Court the plaintiff brought forth no evidence as to the reasonable value of the five subject properties other than the

figure of "$23,324.36" contained in plaintiff's Exhibit 11.

The burden of proving damages was upon the plaintiff.

Tremeroli v. Austin Trailer Equip. Co., 102 Cal. App. 2d 464, 227 P. 2d 923 (1951).

If Lifetime were forced to make a cash payment of 75% of the long-term sales price the effect would be to give Jefferson a profit on the entire transaction whereas all the evidence is that there was a considerable loss on the overall transaction.

Mr. Weinstein, trial counsel for the plaintiff, indicated on various occasions that the plaintiff was not seeking any profit.

In his closing argument he stated:

"We are willing to take our shellacking if there has to be one. This is not a sour grapes situation. This is not a case in which we want to earn a profit. We know it is a loss situation. We knew what property this was when we bought it and we knew this was a transition area.

We took this risk voluntarily. We are not asking for any special interpretation. We are not asking for any favors." [R. T. p. 500, lines 9-17].

Later in final argument he went on to state:

"I think this probably can be resolved without doing any great harm to anyone except my client. My client is going to suffer whether your Honor gives us a total victory or total loss. Because if your Honor says we are right and the agreement must be construed as we contend, that property is going

to be disposed of, Your Honor, and it is going to be disposed of at a loss. We are expecting a loss. We hope there won't be any but we are ready to accept it. As I mentioned before, we are big boys. We entered this agreement and all we want are the rights under that agreement as these very parties before us have interpreted it." [R. T. p. 505, line 21, to p. 506, line 8].

Jefferson's total interest in the properties was $32,-974.61 [R. T. p. 492, line 1]. In this appeal Jefferson is asking for 75% of the total sales price or $37,087.50 which would be a profit to it of over $4,000.00 on the overall transaction. Such can hardly be said to be consistent with the statement of counsel for the plaintiff before the Court below that his client did not want a profit but was willing to take its loss.

It should also be noted that the Court below stated that it was not taking as the basis of its judgment the prices which were set forth in Exhibit A pertaining to the subject properties [R. T. p. 531, lines 9-11].

VI.

Conclusion.

For the foregoing reasons Lifetime respectfully submits that the judgment of the trial court as to Count II should be affirmed.

Respectfully submitted,

WEITKAMP, RIDDLE & BEDROSIAN,
By FREDRICK J. WEITKAMP,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDRICK J. WEITKAMP